STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

1988 CA 0356

ABDULLAH HAKIM EL-MUMIT

VERSUS

KENNETH J. FOGG, JUDGE, ET AL

Judgment rendered: SEP 2 8 2017

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On Appeal from the
Twenty-First Judicial District Court
In and for the Parish of Livingston
State of Louisiana
No. 52, 817 Div. E

The Honorable Edward B. Dufreche, Judge Presiding

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Abdullah Hakim El-Mumit D.O.C. #1029229, Gar 1-L-#3 Louisiana State Penitentiary Angola, LA	Plaintiff/Appellant In Proper Person
Brent E. Kinchen Stephen F. Butterfield Baton Rouge, LA	Attorneys for Defendant/Appellee, Dr. Alan Day
Clifford Jay Enten Stephen M. Pizzo Metairie, LA	Attorneys for Defendant/Appellee, Dr. Richard Strobach
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Dr. Edwin Walker

* * * * *

BEFORE: HIGGINBOTHAM, HOLDRIGE, AND PENZATO, JJ.

HOLDRIDGE, J.

This appeal concerns the dismissal of several defendants from a prisoner's suit for damages for alleged violations of his constitutional rights and for conditions of his incarceration after his arrest and before his conviction. Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY

On August 18, 1986, Abdullah Hakim El-Mumit (plaintiff)[1] was convicted of first degree murder and sentenced to death for killing Deputy Edward Toefield, Jr., of the Tangipahoa Parish Sheriff's Office on February 2, 1984. State v. Sparks, 88-0017 (La. 5/11/11), 68 So.3d 435, 448-49, cert. denied, 566 U.S. 908, 132 S.Ct. 1794, 182 L.Ed.2d 621 (2012). Plaintiff appealed, and the case went directly to the Louisiana Supreme Court by operation of law. La. Const. art. V, § 10; La. C.Cr. P. art. 912.1; Sparks, 68 So.3d at 448. While the appeal was pending, plaintiff brought the civil proceedings that are the subject of the present appeal to recover money damages for diverse alleged deprivations and improprieties that occurred before and during his trial for first degree murder in the Twenty-First Judicial District Court for Livingston Parish. The district court ultimately dismissed numerous defendants from plaintiff's civil suit.

On plaintiff's initial appeal to this court of the dismissals in his civil suit, we stayed the appeal until final resolution of plaintiff's criminal appeal based on our finding that plaintiff's allegations were an attempt to have this court review his criminal proceedings, which, as earlier noted, were on appeal to the Louisiana Supreme Court. El-Mumit v. Fogg, 542 So.2d 149, 151 (La. App. 1 Cir. 1989). The Louisiana Supreme Court affirmed plaintiff's conviction, conditionally affirmed his death sentence, and remanded the matter to the district court for an

[1] Plaintiff's name was legally changed from Thomas Sparks to Abdullah Hakim El-Mumit after his incarceration. See Sparks v. Ware, 509 So.2d 811, 813 (La. App. 1 Cir. 1987).

evidentiary hearing on plaintiff's claim that he received ineffective assistance of counsel during the penalty phase of his trial. State v. Sparks, 88-0017 (La. 5/11/11), 68 So.3d 435, 448, cert. denied, ___ U.S. ___, 132 S.Ct. 1794, 182 L.Ed.2d 621 (2012). Thereafter, pursuant to an agreement between the state and plaintiff, the district court vacated plaintiff's death penalty sentence and sentenced him to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. State v. Sparks, 2016-0999 (La. App. 1 Cir. 2/17/17), 2017 WL 658778. Plaintiff appealed his life sentence and this court affirmed the sentence. Id. On April 28, 2017, following the conclusion of the criminal proceedings, this court lifted the stay in the instant appeal.

Numerous individuals were named as defendants in the civil suit, including Kenneth J. Fogg, Judge for the Twenty-First Judicial District Court;[2] Freeman W. Ramsey, William M. Quin, and Thomas B. Waterman, Assistant District Attorneys for Livingston Parish; Abe Ross and Nelda Glascock, Warden and Assistant Warden, respectively, of Livingston Parish Prison; Willie Graves, a Livingston Parish Sheriff's detective; Dr. Ralph Maxwell, coroner of Tangipahoa Parish; Dr. Richard Strobach, a physician in private practice; Dr. Alan Day, a dentist in private practice; and Dr. Edwin Walker, a physician in Livingston Parish.

The suit appears to have been brought under both state tort law and the Civil Rights Act of 1871, 42 U.S.C. § 1983. The suit seeks monetary redress for alleged improper treatment during plaintiff's incarceration after his arrest and for alleged infirmities in the criminal proceedings that resulted in his conviction. The suit alleged that on February 10, 1984, after his arrest, plaintiff was placed in the Livingston Parish Prison where Graves was sheriff and Ross and Glascock were

[2] The petition recited that all defendants were sued in their respective official and individual capacities. Joseph E. Anzalone as judge, Duncan S. Kemp as district attorney, and Odom Graves as sheriff were named as defendants, but were later voluntarily dismissed from the suit.

wardens. Plaintiff raised various complaints about his incarceration, particularly seeking damages for being placed on lockdown status, allegedly improperly.[3]

Plaintiff makes several allegations about certain actions that he contends deprived him of a fair trial, which took place from August 11 through August 18, 1986.[4] He alleged that defendants Ross and Glascock violated an order prohibiting pretrial statements regarding the pending criminal proceedings to the press; that defendants (without specifying which defendants) detained him so that he missed the calling of the jury venire and the jury's receipt of instructions; that Graves set up security, which caused a "carnival or circus atmosphere"; that Waterman[5] and Ramsey acted as his defense attorneys, that Ramsey then used information about his defense to obtain a job with the District Attorney's office, and that Waterman gave information to the District Attorney's office; and that Waterman and Ramsey withheld certain allegedly exculpatory evidence. Plaintiff alleged that Ross violated a court order allowing him to remain in the parish prison and speak with his court-appointed counsel and had him transferred to the Louisiana State Penitentiary in Angola; he alleged this transfer took place between June and August of 1986. Plaintiff also alleged that Ross violated a court order allowing him to view the scene of the crime and evidence to be used in the case. Plaintiff

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[3] More specifically, plaintiff alleged that during his incarceration in the Livingston Parish prison, he was denied visitors; he was confined in a cell that was infested with bugs and contained open drainage in the floor; he was kept in the cell with an open gunshot wound; the cell had no windows and he could not communicate with other inmates; he was not allowed to shower daily; he was not given a copy of the prison rules upon his arrival or afforded a full hearing before being placed on lockdown status; and he could not attend religious services while on lockdown status.

[4] Plaintiff's petition does not always identify which specific defendants he is complaining about, and he does not always give the correct pertinent dates. Because he is in proper person, we are not holding plaintiff to the stringent standards applied to attorneys; however, because plaintiff named fifteen people as defendants and listed twenty-four allegations covering different periods of time, it is challenging to interpret the petition.

[5] Plaintiff initially alleged that Judge Joseph E. Anzalone was one of his defense attorneys who gave information to the District Attorney's office and then later withheld exculpatory information from him, but then later amended his petition to substitute Waterman's name for that of Judge Anzalone.

alleged that Judge Fogg changed the venue for the trial, granted a psychiatric evaluation, housed him where the victim's son was a trustee, and denied his request for habeas corpus relief.

Plaintiff alleged that he was taken against his will to Dr. Day for dental x-rays on August 11, 1986 by Ross, Graves, and Waterman; on the same date, he alleged he was taken to Dixon Memorial Hospital by unidentified defendants where Dr. Walker performed a body cavity search and performed x-rays.[6] In reading these allegations together with plaintiff's other allegations, it appears plaintiff missed the calling of the jury venire and the giving of initial instructions at the beginning of his trial because he was at Dr. Day's office and Dixon Memorial Hospital.[7]

Defendants Ross, Glascock, and Graves filed an exception of prescription and no cause of action, which was granted, and those parties were dismissed from the suit in a judgment signed on October 27, 1987. Assistant District Attorneys Quin, Ramsey, and Waterman filed an exception of no cause of action, which was granted, and those parties were dismissed from the suit in a judgment signed on October 28, 1987. Dr. Strobach filed an exception of no cause of action, which was granted, and he was dismissed from the suit in a judgment signed in November of 1987; Dr. Day filed an exception of no cause of action and/or alternatively, a motion for summary judgment, and was dismissed from the proceedings in a judgment signed in November of 1987.[8,9]

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[6] Plaintiff alleged that Drs. Maxwell and Strobach violated his rights in conjunction with his examination for a court-ordered Sanity Commission Report (requested by plaintiff's counsel).

[7] The record contains evidence that on August 11, 1986, pursuant to court order, plaintiff was to undergo a body cavity examination and submit to dental x-rays to ensure security for all parties at the trial. The warden received information that plaintiff could have foreign objects in his mouth or anal tract that were dangerous.

[8] The district court held a hearing on August 31, 1987 on the exceptions and Dr. Strobach's motion for summary judgment; the court took all matters under advisement.

Plaintiff filed three pleadings entitled "NOTICE OF INTENTION TO TAKE WRITS AND/OR APPEAL," two of which refer to the judgment on October 27, 1987, and one of which refers to judgments rendered on October 27 and 28, 1987. The district court signed the three orders for appeal. On appeal, plaintiff contends that his claims regarding acts which occurred in August of 1986 were not prescribed because suit was filed on May 26, 1987. He also contends that the district attorneys named as defendants are not entitled to immunity because they "knowingly" and "maliciously" denied plaintiff his constitutional rights Lastly, he contends that he was entitled to damages for being improperly placed on lockdown status.

DISCUSSION

We initially will address a jurisdictional issue before addressing the merits of this appeal as appellate courts have the duty to examine subject matter jurisdiction *sua sponte,* even when the parties do not raise the issue. Noyel v. City of St. Gabriel, 2015-1890 (La. App. 1 Cir. 9/1/16), 202 So.3d 1139, 1142, writ denied, 2016-1745 (La. 11/29/16), 213 So.3d 392. As to any possible appeal of the judgments of November of 1987 dismissing Drs. Strobach and Day from the suit, the record does not contain any motion and order for appeal as to those judgments. Louisiana Code of Civil Procedure article 2121 provides that "[a]n appeal is taken by obtaining an order therefor[.]" Louisiana Code of Civil Procedure article 2088 provides that the trial court's jurisdiction is divested and that of the appellate court attaches "on the granting of the order of appeal[.]" A party wishing to appeal an

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The judgments as to Drs. Strobach and Day contain blanks for the day and month, but only the blank for the month was filled out by the judge.

[9] Judge Fogg filed an exception of no cause of action but the record does not contain a judgment or ruling on the exception. Dr. Walker filed an exception of improper service, but the record does not contain a ruling on that exception. Dr. Walker answered the petition, denying all allegations.

adverse judgment must obtain an order of appeal. Noyel, 202 So.3d at 1142. There can be no appeal absent an order of appeal because the order is jurisdictional; this lack of jurisdiction can be noticed by the court on its own motion at any time. Id. We note that plaintiff's brief does not address any issues as to the judgments dismissing Drs. Day and Strobach; moreover, these judgments are not attached to the appellate brief, unlike the judgments of October 27 and 28, 1987, as is required for the judgment "complained of" by Uniform Rules-Courts of Appeal, Rule 2-12.4(B)(1). Therefore, as to the judgments dismissing Drs. Strobach and Day from the suit, because there is no motion and order for appeal referencing these judgments, this court has no jurisdiction and the appeals from the November 1987 judgments must be dismissed.

The other issues in this appeal concern whether the trial court erred in granting the exceptions of no cause of action and prescription as to Ross, Glascock, and Graves, and the exception of no cause of action as to Quin, Waterman, and Ramsey. An exception of no cause of action questions whether the law extends a remedy against the defendant to anyone under the factual allegations of the petition. Badeaux v. SW. Computer Bureau, Inc., 2005-0612 (La. 3/17/06), 929 So.2d 1211, 1217. The exception is triable on the face of the petition and, to determine the issues raised by the exception, each well-pleaded fact in the petition must be accepted as true. Id. In reviewing a district court's ruling sustaining an exception of no cause of action, appellate courts conduct a *de novo* review because the exception raises a question of law and the district court's decision is based only on the sufficiency of the petition. Id.

Plaintiff's allegations involved the fairness of his criminal trial and the conditions of his pretrial incarceration. In the initial appeal of this matter, this

court stated that plaintiff was attempting to seek review of his criminal proceedings. This court then explained:

> In *Richardson v. Fleming*, 651 F.2d 366 (5th Cir. 1981), the United States Fifth Circuit Court of Appeals held that for purposes of 42 U.S.C. § 1983, it is not the relief sought but rather the basis of the claim, that determines whether the claim is cognizable under 42 U.S.C. § 1983, and that if the claim attacks the constitutionality of the state conviction, the exclusive remedy is habeas corpus with its prerequisite of exhaustion of state remedies. 651 F.2d at 372-73. Clearly, then, under the rationale of *Richardson,* had this suit been brought in federal court, it would have been dismissed.[6] The federal courts have extended this doctrine beyond the principals of comity to include the collateral attack of a *federal* conviction, holding that the federal habeas corpus remedies under 28 U.S.C. § 2255 must first be exhausted prior to bringing a suit under 42 U.S.C. § 1983 on a claim that would "factually undermine [the] conviction." *Dees v. Murphy,* 794 F.2d 1543, 1544-45 (11th Cir. 1986), quoting *Richardson,* 651 F.2d at 373.
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> We are a court of limited jurisdiction. *See* La. Const. art. V, § 10. We are not vested with jurisdiction of an appeal from criminal proceedings which result in a sentence of death. LSA-C.Cr.P. art. 912.1. We therefore think it inappropriate to entertain an appeal involving issues currently pending before our supreme court and beyond our jurisdiction.
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> For reasons of efficient judicial administration and in the interest of justice, we order the appeal stayed until final resolution of plaintiff's criminal appeal.
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> [6] At least insofar as the petition would be construed to collaterally attack the state court conviction, it would be dismissed. *See Richardson v. Fleming*, 651 F.2d 366, 373 (5th Cir. 1981).

El-Mumit, 542 So.2d at 151.

Since the earlier appeal before this court, the United States Supreme Court decided Heck v. Humphrey, 512 U.S. 477, 486-87, 114 S.Ct. 2364, 2372, 129 L.Ed.2d 383 (1994), wherein it held that a plaintiff who has been convicted of a crime cannot bring a § 1983 claim challenging the constitutionality of his conviction unless that conviction has been reversed, expunged, declared invalid, or called into question by federal habeas corpus. Heck bars claims for harm caused by actions whose unlawfulness would render a conviction or sentence invalid. Id. Thus, unless the conviction has been overturned, a plaintiff cannot bring a § 1983

claim if prevailing on that claim would imply that his conviction was invalid. Williams v. Harding, 2012-1595 (La. App. 1 Cir. 4/26/13), 117 So.3d 187, 190. The jurisprudence clearly holds that civil suits are not allowed to collaterally attack previous criminal convictions. Id. at 191.

Plaintiff's claims against Waterman, Quin and Ramsey (the district attorney defendants) and his claims regarding the denial of a fair trial against Ross, Glascock and Graves challenge the validity of his conviction, and they are the type of claims that are barred by Heck and its progeny. See Williams, 117 So.3d at 190. This court's stay was lifted after the decision affirming plaintiff's conviction became final. Because of the Heck bar to plaintiff's claims as to Waterman, Quin, and Ramsey, and as to those claims concerning the denial of a fair trial as to Ross, Glascock, and Graves, we affirm the dismissal of these claims. We pretermit discussion of the affirmative defense of prosecutorial immunity.

Plaintiff also urged claims against Ross, Glascock and Graves regarding the conditions of his confinement. They contended that those claims are prescribed because plaintiff's claims concerned the time period shortly after his arrest, in February, 1984, and suit was not filed until May 26, 1987. The party urging the exception of prescription has the burden of proving facts to support the exception, unless the petition is prescribed on its face. State by & Through Caldwell v. Fournier Industrie et Sante & Labs. Fournier, S.A., 2015-1353 (La. App. 1 Cir. 12/22/16), 208 So. 3d 1081, 1084. Although evidence may be introduced to support or controvert the peremptory exception of prescription, in the absence of evidence, the objection of prescription must be decided upon the facts alleged in the petition, with all allegations accepted as true. Id. No evidence was introduced at the hearing as to the defendants' exception of prescription. The trial court's judgment raises a pure question of law for appellate review. In a case involving no

dispute regarding material facts, but only the determination of a legal issue, the reviewing court must apply the *de novo* standard of review, under which the trial court's legal conclusions are not entitled to deference. Id.

While 42 U.S.C. § 1983 does not provide a statute of limitations for 1983 actions, the settled practice is to adopt the appropriate state limitation period as federal law if the state law is not inconsistent with federal law or policy. Graugnard v. Capital Area Transit Sys., 2012-2025 (La. App. 1 Cir. 12/20/13), 137 So. 3d 26, 30, writ denied, 2014-0128 (La. 3/21/14), 135 So. 3d 621. Louisiana's one-year liberative prescription for delictual actions, set forth in La. C.C. art. 3492, provides the limitation period for § 1983 actions. Id. Therefore, the district court properly sustained the exception of prescription filed by Ross, Glascock, and Graves.[10]

CONCLUSION

For the foregoing reasons, plaintiff's contentions on appeal have no merit, and we affirm the judgments of October 27, 1987 and October 28, 1987, dismissing plaintiff's claims against defendants Freeman W. Ramsey, William M. Quin, Thomas B. Waterman, Abe Ross, Nelda Glascock, and Willie Graves. The appeal, if any, as to the judgments of November of 1987 dismissing plaintiff's claims as to Dr. Richard Strobach and Dr. Alan Day, is dismissed. All costs of this appeal are to be paid by plaintiff, Abdullah Hakim el-Mumit.

AFFIRMED. APPEAL OF NOVEMBER 1987 JUDGMENTS DISMISSED.

[10] Plaintiff's contention on appeal that his claims regarding acts which occurred in August of 1986 were not prescribed because suit was filed on May 26, 1987 are irrelevant because those claims pertain to his trial and were appropriately dismissed on the exception of no cause of action based upon Heck.